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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954
No. 621

GEORGE R. DAVIS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

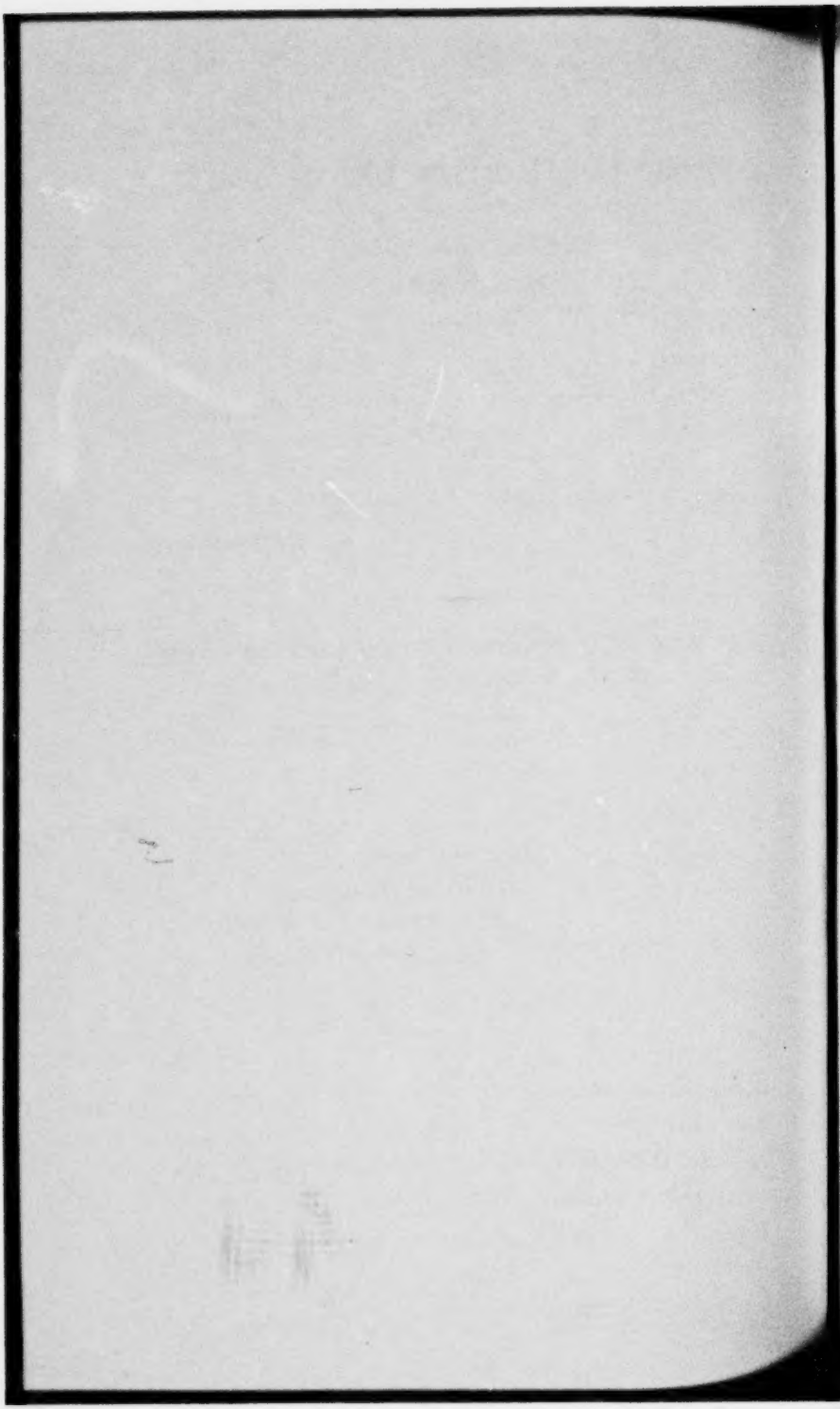
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

PAGE

(a) Reference to official and unofficial reports of opinions delivered in the courts below 2

(b) Statement of the grounds upon which jurisdiction of this court is invoked 2

(i) The date of the judgment sought to be reviewed 3

(ii) The date of the order denying rehearing 3

(iii) Statutory provision conferring jurisdiction in this court 3

(c) The questions presented for review 3

(d) Constitutional provisions and statutes which the case involves 5

(e) Statement of the case 7

Preliminary statement 7

Statement of the facts 8

(f) Manner in which federal issues were raised in the state courts below 9

(g) Reasons relied upon for allowance of the writ 11

Conclusion 20

Appendices:

Appendix A. Opinion of the District Court of Appeal ..... App. p. 1

Appendix B. Opinion of the Supreme Court of the State of California ..... App. p. 6

Appendix C. Judgment ..... App. p. 23

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Avery v. Alabama, 308 U. S. 444	18
Hawk v. Olson, 326 U. S. 271	17
Powell v. Alabama, 287 U. S. 45	14, 17

RULES

Revised Rules of the United States Supreme Court, Rule 21	2

STATUTES

California Constitution, Art. I, Sec. 3 (Cal. State Senate Ed., 1951, p. 3)	2, 5
California Constitution, Art. I, Sec. 13 (Cal. State Senate Ed., 1951, p. 6)	2, 5
California Constitution, Art. VI, Sec. 4½	7
Penal Code, Sec. 274	1
United States Code, Title 28, Sec. 1257(3)	2, 3
United States Constitution, Sixth Amendment	2, 6
United States Constitution, Fourteenth Amendment	2, 6

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Earl Warren, Chief Justice of the United States of America, and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Petitioner prays that a Writ of Certiorari be directed to the Supreme Court of the State of California to review the judgment of the Supreme Court of the State of California, affirming a judgment of the Superior Court of the State of California in and for the County of Los Angeles convicting petitioner of the crime of violation of Section 274 of the Penal Code of the State of California (abortion—two counts) and imposing a sentence to the State Prison.

The Petition of George R. Davis respectfully shows:

(a)* Reference to Official and Unofficial Reports of Opinions Delivered in the Courts Below.

The opinion of the District Court of Appeal of the State of California, Second Appellate District, Division One (2nd Crim. No. 5115), filed May 10, 1954, is reported in 125 Advanced California Appellate Reports 145. It is separately set forth as Appendix A hereto.

The opinion of the Supreme Court of the State of California, filed November 30, 1954, is reported in 43 Advanced California Reports 681. It is separately set forth as Appendix B hereto.

(b) Statement of the Grounds Upon Which Jurisdiction of This Court Is Invoked.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3). Petitioner herein contends that the State of California has contravened the Constitution of the United States, Article XIV, of the Amendments thereto, and Article VI, of the Amendments thereto; and has further contravened Sections 3 and 13 of Article I of the Constitution of the State of California, respecting his right to a fair trial under due process of law and equal protection of the law by denying his motion for a continuance, requiring his counsel to proceed to trial when not properly prepared, requiring his counsel to commence the trial while physically injured, refusing to honor a valid process of the court (Subpoena *Duces Tecum*) to aid counsel in preparation of his defense and by permitting the office of the district attorney to collu-

*In the designation of letters and numbers herein follow those set forth in Rule 21 of Revised Rules of the Supreme Court of the United States.

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sively deprive petitioner of the aid in his defense of confidential documents seized in violation of petitioner's constitutional rights by law enforcement officers.

(i) The Date of the Judgment Sought to Be Reviewed.

The judgment of the Superior Court was entered on the 19th day of August 1953. The judgment of the Supreme Court was filed November 30, 1954.

(ii) The Date of the Order Denying Rehearing.

The petition for rehearing, of petitioner herein, in the Supreme Court of the State of California was ordered denied on the 29th day of December, 1954.

(iii) Statutory Provision Conferring Jurisdiction in this Court.

Section 1257(3), Title 28, United States Code, confers jurisdiction upon this Honorable Court to review by Writ of Certiorari those judgments or orders sought to be reviewed herein.

(c) The Questions Presented for Review.

The following questions are presented for review:

I.

DID THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES VIOLATE PETITIONERS RIGHT TO A FAIR TRIAL UNDER DUE PROCESS OF LAW WITHIN THE PURVIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA ARTICLE XIV OF THE AMENDMENTS THERETO BY DENYING PETITIONERS MOTION FOR A CONTINUANCE OF THE TRIAL DATE BECAUSE HIS COUNSEL WAS:

a. By reason of insufficient time to prepare his defense forced to commence the trial without sufficient preparation, or

b. By reason of having suffered a recent physical injury (broken ankle), appearing in court on crutches with his leg in a cast, unable to properly attend to the preparation of the petitioner's defense, or

c. By reason of having suffered a recent physical injury (broken ankle) unable to withstand the ordeal of a long trial which in turn necessitated bringing in associate counsel during the trial, such counsel being totally unfamiliar with the case.

II.

DID THE SUPERIOR COURT OF THE STATE OF CALIFORNIA VIOLATE PETITIONERS RIGHT TO A FAIR TRIAL UNDER DUE PROCESS OF LAW WITHIN THE PURVIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ARTICLE XIV OF THE AMENDMENTS THERETO:

a. By reason of the wrongful seizure by the arresting officers of the confidential records and books of petitioner at the time of arrest, and the continuous refusal of the police and the district attorney to permit petitioner's counsel the right of inspection of the said records and books in order to prepare his defense, or

b. By reason of the refusal of the trial court to honor the regularly issued process of the court (Subpoena *Duces Tecum*), or

c. By reason of the refusal of the trial court to allow petitioner's counsel inspection of petitioner's books and documents previously subpoenaed, by the Subpoena *Duces Tecum* herein referred to, until the prosecution's case was near completion, and at a point in the proceedings where it was too late for petitioner's counsel to use the books and records to prepare his defense.

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(d) Constitutional Provisions and Statutes Which the Case Involves.

I.

Article I, Section 3, Constitution of the State of California, California State Senate Edition, 1951, page (3), which reads as follows:

> "United States Constitution Supreme Law.
>
> "Sec. 3. The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

II.

Article I, Section 13, Constitution of the State of California, California State Senate Edition, 1951, page 6, which reads as follows:

> "Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homi-

cide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

III.

Article XIV of the Amendments to the Constitution of the United States, which reads as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws."

IV.

Article VI of the Amendments to the Constitution of the United States, which reads as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

(e) Statement of the Case.

Preliminary Statement.

Petitioner respectfully desires to set forth briefly a preliminary statement relating to the facts of the case. The facts of the case in and of themselves are not directly related to the issues raised herein. The District Court of Appeal reversed the decision of the trial court upon grounds other than those raised by the issues herein, hence the Court stated as to the matter of violation of due process, urged by petitioner-appellant therein, "Appellant's first contention above mentioned is by no means without merit, but, inasmuch as the judgment must be reversed for other reasons, that question need not be determined" (Appendix A). The decision of the Supreme Court of the State of California confessed that although the trial court committed error in other respects than here urged, such error under the provisions of Article VI, Section 4½ of the Constitution of the State of California was not sufficiently prejudicial to require reversal of the judgment.

All of the issues raised herein were presented to the trial court in the nature of a request for a continuance. All of the facts are necessarily based upon the statements of counsel plus the affidavit of the petitioner. The portion of the trial transcripts of the proceeding herein referred to are found in the Supplement to Reporter's Transcript on Appeal pages 1-24, Reporter's Transcript on Appeal, pages 3-7, 52, Supplemental Clerk's Transcript, pages 1-5.

Statement of the Facts.

Upon the calling of the case for trial in the Superior Court on Wednesday, July 15, 1953, at 9:00 A. M. counsel for petitioner moved the court for a "continuance on several grounds." *First:* counsel for petitioner set forth that certain books and records of appellant had been seized by the arresting officer at the time of the arrest without benefit of process. *Second:* counsel had made repeated requests of the officer and of the Deputy District Attorney in charge of the case for inspection of the records, all of which requests had been denied. *Third:* counsel had advised the Deputy District Attorney that he would subpoena the said records and seek a continuance of the trial to afford him an opportunity to inspect the records. *Fourth:* counsel had procured the issuance of the subpoena *duces tecum* and the books and records were then available in court, but counsel had been refused the right to inspect the books and records. *Fifth:* that after the arrest of petitioner counsel suffered an accident, was hospitalized for eleven (11) days and appeared in court for the preliminary examination on crutches and returned to his bed for three weeks. That at the time of arraignment, June 22, 1953, in the Superior Court, on the Information of the District Attorney, the trial was set for July 15, 1953, and counsel requested additional time, and was then advised to make a motion for further time in the trial court. *Sixth:* that the case was set for trial three weeks after the date of arraignment, which time was insufficient under the circumstances to prepare a defense. *Seventh:* that because of the physical disability of counsel (counsel was then appearing in court on crutches, with his leg in a cast) he had been unable to adequately attend to the preparation of the de-

fense of the case. The court denied the motion for a continuance. The case proceeded to trial. A résumé of the testimony of the witnesses is contained within the opinion of the District Court of Appeal, Appendix "A" and in the opinion of the Supreme Court of the State of California, Appendix "B."

(f) Manner in Which Federal Issues Were Raised in the State Courts Below.

Counsel for petitioner at the call of the case for trial in the trial court stated in his motion for continuance that the grounds were that "the defendant has been denied his constitutional right to have time to prepare his defense," and the motion was supported by an affidavit of the defendant filed July 15, 1953 with the Clerk of the Court. The trial court denied the motion for continuance. Upon the call of the first witness, counsel renewed his motion, by way of an objection to the introduction of evidence, on the ground that: "the defendant has been deprived of his constitutional right through due process of law under both the California Constitution and the United States Constitution in that he has been deprived of reasonable time in which to prepare his case." The motion was denied (objection overruled).

The issues herein were raised in the Appellate Courts of the State of California in petitioner's brief on appeal, designated "Appellant's Opening Brief," as follows:

> "The Court, In Denying Defendant's Motion For A Continuance, Deprived The Defendant Of His Right To Aid of Counsel And The Process Of The Court In His Defense As Guaranteed By The State And Federal Constitutions, And In So Doing Violated The Due Process of Law Clause Of The 14th

Amendment Of The Federal Constitution And Article I, Section 13 Of The Constitution Of The State Of California."

The same issue was reiterated in Petitioner's Petition For Rehearing After Decision Of The Supreme Court Of The State Of California, In Bank.

The Decision of the District Court of Appeal did not consider the constitutional issues because the Court found it necessary to reverse the judgment of the trial court on other grounds. The Supreme Court of the State of California granted a hearing after decision by the District Court of Appeal. The Supreme Court ruled that petitioner was not prejudiced by the refusal of the trial court to grant a continuance, first, because although, the defendant did not have an opportunity to examine the records seized by the arresting officer until the close of the prosecution's case, he did have such opportunity thereafter, thus the court held:

> "In the absence of another request for a continuance after examination of these books, it does not appear how defendant was prejudiced in the preparation of his defense. (People v. Owens, 132 Cal. 469, 471.)"

Second, because after reviewing the time elements involved in the pretrial proceedings the court stated:

> "In view of the above chronology, it cannot be said that the trial court abused its discretion in determining that counsel's injury was not such as to deny defendant effective representation by counsel. Moreover, the period from June 22 to July 15, 1953 was not an unreasonably short length of time in which to prepare a defense. (People v. Dorman, 28 Cal. 2d 846, 850-852; People v. Anthony, 90 Cal. App. 2d 122, 134.)"

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(g) Reasons Relied Upon for Allowance of the Writ.

It is the position of the petitioner that he was denied the rights secured to him by both the State and Federal Constitutions, to the effective aid of counsel; to a reasonable time in which to prepare his defense; and to the processes of the Court in his behalf; all of which are necessary to the conduct of a fair trial. And it is submitted that this is demonstrated by the conduct of the Court in denying his motion for a continuance. A portion of the proceedings that took place at the call of the case for trial follows:

> "Mr. Erwin: I submit, your Honor, Mr. Carr told me this morning; 'Well, the reason we don't want a continuance is for the very reason that you do.' And the very reason he doesn't want a continuance is that he doesn't want me to get the evidence in those books, and I can't get that evidence by—
>
> Mr. Carr: No.
>
> The Court: Mr. Erwin, I don't know how the court can help you get—
>
> Mr. Erwin: I can get them by an action in claim and delivery.
>
> The Court: I am not going to wait around for you to do that.
>
> Mr. Erwin: I can file one today and have them tomorrow . . ."

Further, the petitioner repeated his request for additional time to inspect the records and a continuance based upon such grounds, by way of an objection to the introduction of evidence at the commencement of the prosecution's introduction of evidence. That said objection was made on the 17th day of July, 1953, indicating that the

said records sought by petitioner to prepare his defense had been available to the Court for at least two days.

Hence, it must appear that the only conclusion that can be drawn is that the reason that the petitioner was not accorded the right to inspect the records or a continuance in which he could obtain access to the records for the proper preparation of his defense is that the documents contained something that the prosecution did not want the defendant to see prior to the introduction of the prosecution's case. Petitioner submits that it is a proper inference that the evidence would have aided the petitioner in presenting his defense. The decision of the Supreme Court of the State of California that the wrongful seizure by the police of the records of a defendant and the refusal of the right of inspection, even by the processes of the court (subpoena *duces tecum*), until such time as they cannot aid the defendant and then telling him he did not suffer any prejudice thereby because he did not again request a continuance until after it was too late to do him any good offends the concept of due process under the Constitution of the United States.

Petitioner respectfully submits that the attitude of the prosecution in this case is a flagrant example of the misuse of their high office. The duty of the prosecution to protect the rights of defendants is equal, if not greater, than their duty to secure the conviction of the guilty. Witness here the attitude of the prosecution:

> "Mr. Carr: We don't use search warrants, because no one would stay there and wait and hold the property until they got a judge to sign one and come back with the search warrant."

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This in spite of the fact that the evidence in this case of the prosecution's own witness, Officer Zander, showed that the petitioner had been under investigation from the year 1950 or 1951. The arresting officer himself described it as "a rather lengthy investigation" [R. T. 286].

Perhaps the law is deficient in that it gives a defendant no procedure by which pre-trial inspection is allowed. However, the petitioner was not asking for something that the trial court could not have ordered with perfect propriety, that is, the Court could have ordered the officer to make available the inspection of the documents in accordance with the subpoena *duces tecum* that had been issued. Under state law the order of proof is within the discretion of the Courts. Would the law deny the trial court such inherent power even in the absence of a subpoena if such procedures enables the petitioner to prepare his defense. It must be borne in mind that the law not only gives the petitioner the right to present his defense, but also the right to *prepare* a defense. If this right is given only lip service then the law ignores the important, though perhaps subtle, techniques of trial work. The product of cross-examination is, according the best authorities, nothing more than the result of long and intense preparation for trial. Of what value would the right of cross-examination of a prosecution witness be if the material with which the cross-examiner needs be armed be locked in the bossom of a witness whom the defendant cannot interview, because the witness' names and addresses are secreted in an address book being hidden from the petitioner by the simple method of permitting the police to seize it at the time of arrest and never refer to it until after all of the prosecution's witnesses have been examined. A

document may be important in and of itself, but it may also be a clue or a lead to a clue, a piece of a jig saw puzzle that convinces the jury and satisfies the conscience, or perhaps gives times, dates and names that refresh the recollection. Petitioner's counsel pointed this out to the trial court in part upon his motion for a continuance to no avail. In this connection it is significant that petitioner was unable to produce a single witness in his behalf. And further, petitioner's counsel charged the prosecution with deliberately withholding the information, and being obstructive to the efforts of petitioner to preparation of his defense.

The issue presented herein is one of first impression, although within the rule of *Powell v. Alabama,* 287 U. S. 45. The issue is: *Has petitioner been deprived of due process of law by the action of state officials under the following circumstances: (1) where the arresting officers seized without legal process petitioner's private book and records and then refused petitioner access to such records and said action was concurred in by the District Attorney by objecting to a continuance to preclude the petitioner from gaining an opportunity to use other legal methods to obtain such records; (2) where the trial court refused to honor the processes of the court (production of records and inspection at the commencement of the trial upon a previously issued subpoena duces tecum), (3) where the trial court refused counsel the right to inspect the records at the time of trial before the production of other evidence; and (4) where the trial court refused a continuance so as to prevent petitioner from invoking other legal methods to obtain an inspection of the records.*

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It is serious indeed when a defendant in a criminal case does not have the needed time to prepare his defense due to the uncooperative bent of the prosecution and the Court, but it is a travesty on the right of "fair" trial when an officer of the state can illegally seize and withhold the means by which a defendant might defend himself and the prosecutor and the Court uphold such action. An analogous situation would be if the officers of the state hid out the witness that could prove the defendant was absent from the scene of the crime and the Court would not honor its processes nor exercise its powers to enforce his attendance. It is well to keep in mind that the right of the defense in a criminal trial is not alone the right to have the defendant take the stand or present defense witnesses, it is also the right to meet the evidence presented by the prosecution's witness by way of cross-examination, which material for cross-examination is gathered and prepared for trial by consultation with other witnesses.

Counsel for petitioner at the time of the motion for a continuance presented several concrete reasons why an inspection of the records would have aided in the preparation of his defense. Petitioner's counsel stated:

> "Mr. Erwin: However, we are not prepared and can't be prepared until we have the names of all our witnesses. They are in their possession, their addresses." [Supp. Rep. Tr. on Appeal p. 2, lines 7-9.]
>
> "Mr. Erwin: That would be sufficient if I can get a continuance I can't examine the records and get the names of fifty or sixty witnesses and interview them today." [Supp. Rep. Tr. on Appeal p. 3, lines 5-8.]

To the suggestion of the prosecution that petitioner had the names and addresses of the prosecutions witnesses who testified at the preliminary hearing counsel replied:

"Mr. Erwin: Certainly the evidence of the prosecution's case was available to counsel, but the evidence necessary to our defense has not been available. It has been in the hands of the police officer, and we submit we are entitled to see it." [Supp. Rep. Tr. on Appeal p. 4, lines 9-13.]

". . . I know that more than a week ago I called Mr. Carr and I advised him that certain records had been taken from the defendant's office that were necessary to the preparation of our defense and asked him if I could have an opportunity to see them. He told me that they were in the hands of the officers. I told him that I thought he could probably get them for me if he wanted to. He said he didn't care to. I advised him that I was going to subpoena the records with a subpoena *duces tecum* and ask the court for a continuance on the grounds that I was not prepared because it is necessary to have those records for our defense, which I did.

I also called the officers and told them the same thing . . ." [Supp. Rep. Tr. on Appeal p. 7, lines 1-14.]

". . . Now, we have a number of witnesses. One of them is Kay Holliday. She was arrested the same time this defendant was arrested. The case was dismissed against her at the preliminary hearing. I am informed she is in Las Vegas, Nevada. We have no address for her. However, I have contacted an attorney, Mr. Ray, who advises me he couldn't tell me where she was. He said he wasn't at liberty to tell me where she was, but he would produce her if I advised him in time to have her here for trial.

> She was on the premises and she is an absolutely necessary witness, and the names and addresses of the people who are listed in the books we have subpoenaed are necessary witnesses . . ." [Supp. Rep. Tr. on Appeal p. 7, line 25, to p. 8, line 11.]

An affidavit to like effect by the petitioner was filed of record on the date said motion was made by counsel for petitioner in the trial court.

In further support of petitioner's contention that the refusal of the District Attorney to allow a reasonable continuance or an inspection of the records, even at the time of the call of the case for trial, was for the purpose of preventing the petitioner from obtaining inspection of the records, as charged by petitioner's counsel in his motion for a continuance, is the fact that those books and records were not produced at the time of the preliminary hearing, but substantially every other bit of testimony that was produced by the prosecution at the time of trial had been produced at the preliminary hearing. And of the three documents seized by the arresting officer only one was introduced into evidence by the prosecution. Petitioner asserts that the books had no special value to the prosecution's case other than to withhold them from the defendant so that he could not fairly defend himself.

What is the purpose of securing to a defendant the right to counsel, is it merely that he shall be represented in the court? This question is answered in the case of *Powell v. Alabama (supra)*, and in *Hawk v. Olson*, 326 U. S. 271, and others of recent origin. In the *Powell* case the Court stated:

> "In any event, the circumstances lend emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants,

> that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."
>
> *Cf. Avery v. Alabama,* 308 U. S. 444.

In support of petitioner's contention that he was not afforded the full and vigorous aid of counsel to which he is entitled is the fact that his counsel at the commencement of the trial was on crutches, with one leg in a cast. (This and petitioner's contention that there was an inadequate time between the date of arraignment on the Information and the date of trial will be discussed together.) Counsel for petitioner in his motion for a continuance in the trial court stated:

> "A plea was entered in this case on June 22nd. I asked for more time at the time of the setting. I think this was set too quickly. There are four counts of abortion. It takes quite some time to prepare a case of this type. As you Honor can see, I have been incapacitated. I have been unable to get around to the extent that I would like to." [Supp. Rep. Tr. p. 1, lines 20-26.]
>
> "I don't remember now whether I appeared at the arraignment before the preliminary hearing or not. I had an accident and I went to the hospital where I remained for 11 days, then I was confined in bed at home for about seven days and had the preliminary continued until such time as I was able to walk on two crutches and hobble down to court. That was my first appearance after I was released from the hospital. . . .

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The Court: Was the preliminary hearing in this case after you were released from the hospital?

Mr. Erwin: Yes, your Honor. That was my first appearance. I wasn't supposed to get out of bed. I went right back and went to bed. I was confined about three weeks. Another week or two after that I had a number of cases on the calendar continued. I had other attorneys go up and inform the court I was incapacitated and they continued my cases. . . ." [Supp. Rep. Tr. p. 5, line 13, to p. 6, line 7.]

"Mr. Erwin: This case, it seems to me, upon the circumstances here—for justice for the defendant the circumstances require that he have a right to put on a defense; justice requires that it be continued. He can't be represented. I would like to withdraw from the case if I can't get a continuance. I haven't prepared his case.' I haven't even discussed it thoroughly enough with him." [Supp. Rep. Tr. p. 12, lines 16-23.]

Further the record shows that on the 17th day of July, 1953, at 2:00 P. M., after the selection of the jury and one-half day of testimony had been elicited, Mr. John H. Marshall, who up to that time had never been associated with the case was associated with Mr. Erwin as co-counsel and the record shows that after that time Mr. Marshall carried on as counsel in chief for the defense, conducted the examination and cross-examination of witness and presented the final argument to the jury.

Thus it can be readily appreciated that although petitioner was represented by counsel he did not and could not have that "effective" aid to counsel which he was entitled in the preparation and presentation of his defense.

Conclusion.

It is respectfully submitted that when a defendant's rights in a criminal case have been seriously and prejudicially violated by the deliberate action of state officials, obstructed by the office of the prosecuting officer and unprotected by the court the conviction and imprisonment of the defendant cannot stand. When the essential elements of "fair play" are disregarded then the concepts of due process and justice under law are lessened not only in the minds of the convicted, but as well for the people of the State of California.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court to the Supreme Court of the State of California, to the end that the judgment and order of the Supreme Court and of the Superior Court of the State of California in and for the County of Los Angeles may be reviewed by this Honorable Court reversing the judgment and sentence therein and directing the cause to be returned to the Superior Court for a new trial.

Respectfully submitted,

MAX SOLOMON,

Counsel for Petitioner.

JOHN H. MARSHALL,

RICHARD E. ERWIN,

HAROLD J. ACKERMAN,

Associate Counsel.

APPENDIX A.

Opinion of the District Court of Appeal.

[Crim. No. 5115. Second Dist., Div. One. May 10, 1954.]

The People, Respondent, v. George R. Davis, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Mildred L. Lillie, Judge. Reversed.

Prosecution for abortion. Judgment of conviction reversed.

John H. Marshall and Richard E. Erwin for Appellant.

Edmund G. Brown, Attorney General, and Norman H. Sokolow, Deputy Attorney General, for Respondent.

DORAN, *J.*—This is an appeal from the judgment and order denying motion for a new trial.

Defendant was charged by information with the crime of abortion (Pen. Code, §274). Four counts were alleged. The jury returned a verdict of guilty on two counts and not guilty on two counts. A motion for a new trial was deneid.

It is contended on appeal that:

"*POINT I.* The court, in denying defendant's motion for a continuance, deprived the defendant of his right to aid of counsel and the process of the court in his defense as guaranteed by the state and federal constitutions, and in so doing violated the due process of law clause of the 14th Amendment of the Federal Constitution and Article I, Section 13 of the Constitution of the State of California."

"POINT II. The trial court erred in admitting the testimony of an alleged 'Tacit' admission of the defendant. Over objection."

"POINT III. The trial court erred in failing to instruct the jury, as a matter of law, that certain witnesses were 'accomplices.' "

"POINT IV. The trial court erred in failing to instruct the jury in the language of Penal Code, Section 1111."

The alleged victims were Susan Ippolito and Mrs. Louella May Coon. The former testified that "she had missed one of her menstrual periods" and the latter testified that "she believed herself to be pregnant," and that following the examination by defendant, "That the defendant told her she was not pregnant."

Defendant testified, "That he recalled seeing Mrs. Coon in his office on or about March 3, 1953; that she believed she was pregnant; that it did not seem she could be, it was too early to diagnose; that he examined her and followed his usual procedure; that she complained of pain and he suggested that she wait with the examination; that she said she wanted to get it over with; that he made the examination and told her there was no evidence of pregnancy; that he thought she returned later and he made a further examination and advised her he did not think she was pregnant," and "that there was no evidence of pregnancy with reference to Miss Ippolito."

With regard to the motion appellant argues "that at the time of defendant's arrest, without either a warrant for arrest, or a search warrant, the arresting officers took from the home of the defendant three books containing

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information and data necessary to the defendant in the preparation of his defense. That counsel for defendant had several weeks before the time of trial, requested permission of Mr. Carr, Deputy District Attorney, to examine the books, but that permission was denied because they were in the possession of the arresting officers." The record reveals that defendant was denied an opportunity to examine the records until and during the trial. "The second ground for continuance urged by the defendant was he was not ready for trial because his counsel had only recently suffered a serious injury to his right leg, was appearing in court on crutches with his leg in a cast, and because of his injuries, had been unable to prepare the case for trial.

"The third ground for continuance urged by the defendant was that under the circumstances, the defendant had not had sufficient time to prepare for the defense of the case. This ground was based on the fact that the defendant's plea of not guilty was entered June 22, 1953, and the trial was set for July 15, 1953, giving the defendant only about three weeks in which to prepare.

"Upon the denial of the motion for a continuance, counsel stated that he was not ready, and could not proceed, and asked to be relieved as counsel in the case."

With regard to the second contention, it appears from the record that the trial judge overruled an objection to the admission of evidence of a conversation between the officers and the defendant at the time of the arrest. At the time of the objection the prosecuting attorney argued:

"MR. CARR: Well, if the Court please, we propose to show that the witness showed these various items that

have been identified in Exhibit 19, to the defendant and he stated in substance or effect that he, the defendant, has been arrested for performing abortions, wanted to give him an opportunity to make any explanation he wanted to about the things that they found on his premises, that is the instruments and book and so on and so forth. *The defendant stated that he didn't think he wanted to make any explanation, that he didn't think it would do him any good. The officer asked him if he didn't want to discuss it at all and he said no.* Then the officer showed him this book, which is 19, for identification, at which time the officer made the statement in substance as follows: 'I wish to make the formal statement to you, Doctor, I maintain this is a book which is a record kept by you of the persons who have been aborted by you, and with notations indicating the name of the person, the date and time, the amount of money paid to you by them for abortions.' And he then went on to enumerate certain things found in the book, at the conclusion of which the defendant merely made the statement 'O. K.'"

The ruling was prejudicial error. The expression "O. K." merely means all right. (People v. Simmons, 28 Cal. 2d 699 [172 P. 2d 18]; People v. Spencer, 78 Cal. App. 2d 652 [178 P. 2d 520].)

With regard to appellant's third and fourth contentions, the failure of the court to instruct the jury on the law applicable to accomplices, respondent argues that "Such an instruction was not requested." And, that "We submit that there is ample evidence apart from the testimony of any accomplices to sustain the convictions, and that there is ample evidence apart from any accomplice-

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testimony to corroborate the complaining witnesses under Penal Code Section 1108." Both of these arguments are beside the issue. It is the trial judge's duty as a matter of law to instruct the jury in such circumstances even though such instruction is not requested. (People v. Heddens, 12 Cal. App. 2d 245 [55 P. 2d 230]; People v. Scofield, 203 Cal. 703 at 709 [265 P. 914].) Incidentally, the evidence of pregnancy is not conclusive and although the evidence as a whole is not overwhelming it may be, as a matter of law, sufficient.

Appellant's first contention above mentioned is by no means without merit, but inasmuch as the judgment must be reversed for other reasons, that question need not be determined.

The judgment and the order denying defendant's motion for a new trial are, and each is reversed, and the cause remanded for a new trial.

WHITE, *P. J.*, and DRAPEAU, *J.*, concurred.

APPENDIX B.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

People of the State of California, Plaintiff and Respondent, vs. George R. Davis, Defendant and Appellant. Crim. 5618.

Filed Nov. 30, 1954.

Defendant, an osteopath, was charged with four counts and found guilty on two counts of having committed abortions. (Pen. Code, sec. 274.) He appeals from the judgment of conviction and the order denying his motion for a new trial. He contends that the judgment should be reversed because: (1) the trial court denied his motion for a continuance and thereby violated his constitutional rights; (2) the trial court committed prejudicial error in admitting certain testimony regarding conversations had between an officer and defendant at the time of arrest; and (3) the trial court committed prejudicial error in failing to designate certain witnesses, as a matter of law, to be accomplices and to instruct in the language of section 1111 of the Penal Code as to the necessity of corroboration of their testimony. Our reading of the record leads us to the conclusion that no prejudicial error was committed, and that the judgment should be affirmed. (Const., Art. VI, sec. 4½.)

With respect to Count Three, Mrs. Luella May Coon testified that believing herself to be pregnant, she made an appointment with defendant and went to his residence on March 3, 1953, around 8:00 o'clock in the evening,

and that Mrs. Black accompanied her. She was admitted to the front room by a woman. She told defendant of her belief in her pregnancy and told him that she "wanted to get rid of it." She paid the receptionist $350. She then removed her underclothes in the back bedroom and lay flat on her back on a table equipped with stirrups, into which she put her feet. Defendant entered the bedroom and started to make a pelvic examination. Mrs. Black remained with Mrs. Coon during the entire time. Mrs. Coon testified that she suffered such pain at the time defendant was working on her with his probing instruments that she cried out. Mrs. Coon then testified that defendant told her that if she was going to do that he could not go through with it "on account of the neighbors in back." Mrs. Black then told defendant to give back Mrs. Coon's money but defendant said nothing and went ahead. Defendant's receptionist gave her a hypodermic in her hip and a pill. Defendant told her that she could expect to flow three or four weeks later and that she should get in touch with him if she continued cramping and paining the way she did. Mrs. Coon was in defendant's treatment room about 30 minutes. Mrs. Coon further testified that she returned alone to defendant's residence about two weeks later. The same procedure was followed and she again suffered great pain. Mrs. Coon stated that she started to flow two weeks later, and that prior to her visit she had been in general good health and could have borne a child without injury to herself.

Mrs. Black, Mrs. Coon's companion, gave almost identical testimony, except, of course, as to what transpired subsequent to the first visit to defendant's residence. She also testified that she was present in the bedroom during the time that the alleged abortion was being procured,

and that she knew what defendant was trying to do with the instruments. She testified that defendant entered the bedroom carrying the instruments in an old bucket, and that although she told the defendant that it would not be sanitary to use those instruments, he nevertheless used them. Mrs. Black testified that she held Mrs. Coon "keeping her hands down because she kept clawing at him, trying to get away" when defendant, in trying to get her to bleed, used the instruments in a rough manner, which caused Mrs. Coon to suffer pain.

As to Count Two, Mrs. Ippolito testified that she believed herself to be pregnant, having missed a menstrual period. She testified that she previously had had a child; that she had been in general good health and could have borne a child without injury to herself. She went to defendant's residence on April 7, 1953, around 7:30 or 8:00 o'clock in the evening, and was accompanied by Mrs. Hart. She was admitted to the front room by a woman. She then spoke to a gray-haired man with glasses, the same one who examined her, and told him that she believed that she was pregnant because she had missed one of her menstrual periods. She told defendant that her divorce was not final, that she could not get married, that she had a very strict family "and if we went through with it we would be disgraced and very much humiliated." She paid defendant's receptionist $250. Mrs. Hart remained in the front room when Mrs. Ippolito went into the back bedroom. She then lay on her back on an operating table equipped with stirrups, into which she put her feet. Mrs. Ippolito testified that the gray-haired man used instruments in the pelvic examination, and that she felt pain, like a cramping pain. She was in the treatment room about 15 or 20 minutes. The receptionist told her

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that if she started to flow, to use a cold pack and stay in bed. Shortly thereafter, she started to flow.

Mrs. Hart testified that she accompanied Mrs. Ippolito to defendant's residence, and that they were driven there by Paul Cerrito, whom Mrs. Ippolito later married. She testified that defendant was the gray-haired man with whom Mrs. Ippolito had talked in the front room. She also testified that prior to the night in question Mrs. Ippolito had told her that she thought she was pregnant but that she had not seen a doctor. Mrs. Hart thereafter phoned and made an appointment for Mrs. Ippolito, but did not say what the appointment was for. She did not accompany Mrs. Ippolito to the back bedroom, where the alleged abortion was performed.

Defendant admitted that he had made pelvic examinations of the two women and had used the surgical probing instruments identified by them, but he maintained that he did not perform any abortions, and that he merely examined them for pregnancy, which he did not find to exist in either case. A police officer, in the search of defendant's residence at the time of his arrest, found a small black notebook on the dining-room table. The notebook was properly identified and introduced in evidence. At the trial defendant was questioned about the entries under the dates April 7, 1953, and March 3, 1953. The entries appeared in abbreviated form; that is, the name of the person examined, followed by the numeral "8" and, following that, either "2½" or "3½." When asked if those entries did not mean that on the particular date those parties had appointments at the hour of 8 and paid $250, and $350, defendant answered, "possibly so." He at first denied that the entries were in his hand, but later was

in doubt as to who had made them. He admitted that he probably received the $250 and $350 in advance, as was his custom, and he supposed that his nurse had made some financial adjustment with the two women after he had discovered that they were not pregnant. The records for the months in question were in the physical possession of his nurse, whom he had not seen since April 25, 1953. He stated that his patients would come to his office on an average of twice a week for pre-natal care. Although defendant professed to know little about the aforementioned notebook and its entries, when asked if the book would show whether any patient had come to his office more than twice, he stated that it would not. He stated this without looking at the book, although he was given the opportunity to do so. Defendant's license did not permit him to sever or penetrate the flesh. He stated that his nurse must have acted on her own initiative when she gave Mrs. Coon the hypodermic, and that he didn't pay any attention to what she did.

Defendant contends that the court abused its discretion in denying his motion for a continuance of the trial, which was made on the day the case was called for trial. (Penal Code, section 1050.) Defendant's motion was made on three grounds: that the continuance was necessary so that defendant might have accesse to certain records to prepare his defense; that because of illness and disability resulting from a broken leg, his counsel had been unable to adequately prepare the case for trial; and that counsel had only three weeks to prepare for trial which, under the circumstances, was not a reasonable length of time.

At the time of defendant's arrest, certain books and records were taken by the police. They were brought

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into court in response to a subpoena *duces tecum*. These documents were not made available to defendant at the beginning of the trial. Defendant was not permitted to examine them until after the close of the prosecution's case on July 21, 1953. Defendant testified on that day. There were no proceedings on the next day. On July 23, 1953, defendant resumed his testimony, and on that date the defense rested its case. In the meantime defendant had an opportunity to examine the documents in question. In the absence of another request for a continuance after examination of these books, it does not appear how defendant was prejudiced in the preparation of his defense. (People v. Owens, 132 Cal. 469, 471.)

With respect to the alleged illness of defendant's counsel, it does not appear there was an abuse of discretion in denying the motion. Defendant was arrested April 28, 1953. The day after his arrest, counsel obtained his release on bail. In the meantime, counsel had broken his leg but he had the preliminary hearing continued until May 19, 1953, at which time he had been released from the hospital. Counsel, despite his injury, continued to represent defendant at every stage of the proceedings. Counsel appeared at the arraignment, June 2, 1953. Counsel appeared again June 8, 1953, when a motion was made pursuant to Penal Code, section 995. Counsel appeared June 22, 1953, when the motion to dismiss the information was heard and denied. On the same date, defendant entered a plea of not guilty and trial was set for July 15, 1953. Defendant's counsel therefore had from June 22, 1953, to July 15, 1953, in which to prepare the case for trial. In view of the above chronology, it cannot be said that the trial court abused its discretion in determining that counsel's injury was not such as to deny defendant

effective representation by counsel. Moreover, the period from June 22 to July 15, 1953, was not an unreasonably short length of time in which to prepare a defense. (People v. Dorman, 28 Cal. 2d 846, 850-852; People v. Anthony, 90 Cal. App. 2d 122, 134.)

Defendant next contends that the trial court committed prejudicial error in overruling his objection to the admission in evidence of conversations between an officer and defendant at the time of the arrest. The statements of the officer and defendant's responses thereto were offered as evidence of acquiescence by the accused in the truth of the statements made, that is, as tacit admissions.

Officer Zander testified that a conversation was had at the City Hall immediately following the arrest. Officer Zander told defendant that he had been arrested on suspicion of having performed illegal operations; that an investigation of activities about his home had been going on for some time, and that on the day of his arrest several items of physical evidence had been picked up. He told defendant that the police were impartial in the matter, and that if defendant had any explanations he might desire to make, they desired to give him the opportunity to make them. Defendant stated that "he didn't think he would say anything, that he couldn't see where anything he could say would possibly do him any good." Officer Zander asked defendant: "You don't want to discuss this at all?" Defendant answered: "No, I don't want to discuss it."

Officer Zander then testified that he spoke to defendant of Hazel Slocomb, defendant's nurse, who had also been taken into custody. He related to defendant how they had talked to Mrs. Slocomb of the same matters, and how

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they had told her that they suspected her of assisting defendant in the performance of illegal abortions. Officer Zander told defendant that Mrs. Slocomb had denied any knowledge about illegal activity, to which defendant stated: "That's right, she didn't know anything about it."

The officer then testified that he told defendant that he [Zander] was going to make a formal statement. Officer Zander picked up a small, black notebook and stated to defendant: "Isn't it a fact, doctor, that this book is a record that was kept by you of the names of the women upon whom you have performed abortions, with notations indicating the dates upon which the abortions were performed and the amount of money that you received from these women for the performance of those abortions?" To which the defendant replied, "Okay."

The officer also testified to a subsequent conversation had at the "booking" office. While defendant was being "booked," he turned to officer Zander and asked: "What am I being booked for, murder?" The officer answered: "Well, doctor, you haven't lost any girls lately, have you?" Defendant answered: "You know, I have never lost a girl in all my years of practice, either legally or illegally." Defendant made no objection to the admission in evidence of this subsequent conversation.

Defendant contends that this testimony was improperly admitted and relies on People v. Simmons, 28 Cal. 2d 699, and People v. Spencer, 78 Cal. App. 2d 652.

Defendant's responses to accusatory statements may find their way into the record only under the admission exception to the hearsay rule. If the accused person expressly admits the truth of the accusatory statement, both the statement and answer may be admitted. If the

accused person expressly denies the accusatory statement, there is no admission. If the accused makes an evasive or equivocal reply which is not directly responsive to the accusatory statement, or remains silent, it has been held that under certain circumstances both the accusatory statement and the response are admissible. In any event, when the accusatory statement is admitted, it is not admitted as proof of the facts asserted in the statement. Such statements are admitted only to show the reaction of the accused. (4 Wigmore on Evidence (3rd Ed. 1940) sections 1071 and 1072, pp. 70-89.)

When the response to an accusatory statement consists of evasion, equivocation or silence, "It is for the court in the first instance to determine whether the import of the statements is such that it would furnish a foundation for proof of conduct, and it is then for the jury to decide whether the accused was aware the statements were made, whether, under all the circumstances shown, they called for a disclaimer, whether the accused did reply to them, and whether if he did not do so, such failure showed criminal intent or a consciousness of guilt." (People v. Yeager, 194 Cal. 452, 486; People v. Simmons, *supra,* 28 Cal. 2d 699, 713, and cases cited therein.)

In the Simmons case, defendant's course of conduct throughout the interrogation by the police officers was such that this court concluded that replies repeatedly made by defendant to the coercive questioning indicated an obvious intention to take advantage of the privilege against self-incrimination. (People v. Simmons, *supra,* 28 Cal. 2d 699, 716-721.) As this court stated (p. 716): "Obviously, when a defendant repeatedly asserts, as did the defendant here, 'I have told you all I am going to

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tell you,' and is repeatedly pressed by police officials into further conversation, his response is not a free and spontaneous one. It is made under mental, if not physical coercion, exercised by the police officials. . . ." Moreover, if a defendant's silence or refusal to discuss the accusation is the result of a well-considered decision by him, it cannot logically be said that his silence or refusal to discuss the matter indicates an acquiescence in the truth of the accusation.

The circumstances of compulsion and implied coercion which were present in the Simmons case are not present here. Defendant was not repeatedly pressed into conversation after repeated denials. Although at one point defendant stated that he did not want to discuss the circumstances of his arrest, he never reasserted his disinclination to talk. On the contrary, when advised that his nurse had denied any knowledge of illegal activity, defendant stated: "That's right, she didn't know anything about it." And, when the officer accused defendant of keeping a notebook record of his illegal operations, defendant replied, "Okay." Still later, defendant made the incriminating statement that he had never "lost any girls . . . either legally or illegally." This latter remark of defendant was prompted by defendant's own question to the officer. In the light of these conversations, it is plain that defendant had not adopted a policy of silence.

Another factor which was deemed important in the decision of the Simmons case was that accusatory statements are often contained in a lengthy statement which is read to or by the defendant. Thus, under the cloak of an accusatory statement, a great amount of testimony which is otherwise inadmissible is placed before the jury

and may influence it even though cautionary instructions are given. (People v. Simmons, *supra,* 28 Cal. 2d 699, 717 *et seq.*) The accusatory statements by Officer Zander were in no sense lengthy. The statement regarding the black notebook contained nothing which was not brought out by the cross-examination of defendant. Thus, one of the main bases of the Simmons decision does not exist in the present case.

Here, it was for the jury to weigh the responses of defendant and decide whether or not they gave rise to an inference of guilt. The jury was properly instructed that evidence of an accusatory statement was "not received for the purpose of proving its truth, but only to explain the conduct of the accused in the face of it." It cannot be said, under the circumstances presented here, that the trial court erred in admitting the accusatory statements and defendant's responses thereto.

Defendant also contends that the court committed prejudicial error in failing to instruct the jury, of its own motion, that Mrs. Black and Mrs. Hart were accomplices as a matter of law, and that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." (Pen. Code, §1111.)

An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. (Pen. Code, §1111.) Whether or not Mrs. Hart and Mrs. Black were accomplices within the meaning of section 1111 depends upon whether or not they had aided and abetted in commission of the crime charged,

or, not being present, had advised and encouraged its commission. (Pen. Code, §31), or had conspired to procure the abortions (Pen. Code, sec. 182). And the instruction that Mrs. Hart and Mrs. Black were accomplices as a matter of law could be given only if undisputed evidence established the complicity. (People v. Wallin, 32 Cal. 2d 803, 809; People v. Ferlin, 203 Cal. 587, 601; People v. Coffey, 161 Cal. 433, 436.)

The court gave defendant's instruction that "one who brings a woman to a doctor for the purpose of obtaining an unlawful abortion upon her is an accomplice as a matter of law" and an instruction regarding the credibility to be accorded accomplice testimony. This instruction left the question of complicity to the jury and, therefore, did not constitute an instruction that Mrs. Black and Mrs. Hart were accomplices as a matter of law.

Therefore, as to Mrs. Black the court erred in failing to instruct the jury that she was an accomplice as a matter of law. Her testimony shows that she knew that the crime here charged was being committed by defendant, and that she actively cooperated in accomplishing the result. She aided and abetted in the commission of the offense (Pen. Code, §31), and consequently was an accomplice within the meaning of section 1111 of the Penal Code.

However, the court did not err in failing to instruct the jury that Mrs. Hart was an accomplice as a matter of law. Her undisputed testimony shows that she arranged an appointment with defendant for Mrs. Ippolito, but that she did not state the purpose of that appointment. There is no testimony to the effect that she knew at that time that it was Mrs. Ippolito's design to procure her

own abortion. Beyond that, her only further act was that of accompanying Mrs. Ippolito to defendant's residence. There is no direct testimony to the effect that Mrs. Hart had advised and encouraged defendant in the commission of the offense, nor that there had been a conspiracy to procure an abortion; and the mere accompaniment of a victim of abortion to defendant's residence, although realizing at that time the victim's purpose in going there is to obtain an abortion, does not necessarily make the companion an accomplice. (People v. Balkwell, 143 Cal. 259, 261; People v. Brewer, 19 Cal. App. 742, 746; People v. Seiffert, 81 Cal. App. 195, 198; see People v. Wilson, 25 Cal. 2d 341, 346.) Therefore, the court properly left the question as to Mrs. Hart's complicity to the jury. Defendant's requested instruction as given was more favorable to him than authority justifies, and he may not be heard to complain of the court's favorable charge.

It follows, however, that the court erred in failing to give an instruction as to the necessity of corroboration of accomplice testimony. Such an instruction should accompany appropriate accomplice instructions; and it does not suffice, as was done in the present case, to give an instruction regarding the credibility to be accorded to the testimony of an accomplice. More important than the weight to be given to accomplice testimony is the consideration of whether or not that testimony may be considered at all for the purpose of conviction. Without first finding corroboration of an accomplice's testimony, credibility need not be considered.

None of the above-mentioned instructions were requested. Nevertheless, the failure of the trial court to give them of its own motion was error. "It is incumbent

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upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case." (People v. Putnam, 20 Cal. 2d 885, 890.) The rule obtains in proper cases, such as this one, and requires the giving of accomplice and corroboration instructions (People v. Warren, 16 Cal. 2d 103, 117-119; People v. Heddens, 12 Cal. App. 2d 245, 247); and particularly where, as here, although recognizing the necessity of giving instructions, the trial court gave only part of the required instructions (*cf.* People v. Baker, 42 Cal. 2d 550, 575-576), that is, the instruction regarding the credibility to be accorded to accomplice testimony.

Although we have concluded that the trial court erred in failing to instruct the jury upon the law relating to the testimony of accomplices and the necessity of corroboration, we cannot conclude that the error was prejudicial. Reviewing courts will scrutinize with great care any claim of prejudicial error predicated solely upon the omission of the trial court to give of its own motion an instruction, the propriety of which is indicated solely by the condition of the evidence. Prejudicial error will be held to exist if, upon an examination of the entire record (Cal. Const., art. VI, §4½; People v. Warren, *supra*, 16 Cal. 2d 103, 119), it appears that the giving of the instructions was vital to a proper disposition of the case. Such was the state of the record in People v. Warren, *supra*, 16 Cal. 2d 103, and People v. Heddens, *supra*, 12 Cal. App. 2d 245. The record in each of those cases disclosed that the only testimony tending to implicate the appealing defendant was accomplice testimony. Therefore, the omitted instructions were there vital to a proper disposition of the case. If the jury had been properly

instructed concerning accomplices and the necessity of corroboration, the jury might have found that the party testifying was in fact an accomplice and, since there was no corroboration, would have been required to acquit. Such, however, is not the state of the present record. Moreover, it has been frequently held that there is no prejudicial error where the record contains ample evidence to support the judgment without consideration of the testimony of the accomplice. (People v. Robinson, 110 Cal. App. 2d 415, 418; People v. Burton, 91 Cal. App. 2d 695, 712; People v. Sourisseau, 62 Cal. App. 2d 917, 931-932.) Such is the state of the record in this case.

The court properly instructed the jury that defendant could not be convicted upon the uncorroborated testimony of a victim of abortion (Pen. Code, §1108), and it properly delineated the evidence to which the jury might look for the corroboration.

The individual testimony of each victim, which has been summarized above, is sufficient, if corroborated, to support the verdict and judgment of conviction as to each count; and that testimony is amply corroborated. Either one of the women upon whom an abortion was performed can act as a corroborating witness with respect to matters which she may have observed that are relevant to the other count charging the performance of an abortion upon the other woman. (People v. Gallardo, 41 Cal. 2d 57, 63.) The independent testimony of the two victims of abortion is mutually corroborative in that it shows that both abortions were committed in a similar manner following the same procedure. (People v. Gallardo, *supra;* People v. Kendall, 111 Cal. App. 2d 204, 210-211.) The abortions were performed at defendant's residence, at night, in the back bedroom; the victims were admitted into the

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house by a woman; each lay on her back upon an operating table equipped with stirrups, into which she put her feet; the defendant used instruments; probing caused the victims great pain; payment for the services was made to the receptionist; and the entire transaction took from 15 to 30 minutes. In addition, sufficient corroboration is furnished by the defendant's own testimony and inferences therefrom. (People v. Wilson, *supra,* 25 Cal. 2d 341, 347; People v. Sullivan, 144 Cal. 471, 473; People v. Griffin, 98 Cal. App. 2d 1, 25; People v. White, 48 Cal. App. 2d 90, 95; People v. Watson, 21 Cal. App. 692, 697.) Such corroboration may be found in his responses to the accusatory statements and in the fact that much of his testimony closely paralleled that of the two victims except, of course, that in his version his acts constituted only examination for pregnancy. (People v. Garner, 60 Cal. App. 2d 63, 65.)

We have therefore concluded that the trial court's failure to instruct properly regarding accomplices and the necessity of corroboration of accomplice testimony did not constitute prejudicial error, warranting a reversal. (Const., art. VI, §4½.) Section 1111 of the Penal Code is directed at preventing a conviction based upon the uncorroborated testimony of an accomplice. The court in its instructions to the jury subordinated the testimony of Mrs. Hart and Mrs. Black to the role of testimony corroborative of the testimony of the aborted women. The court instructed the jury, as to Count Two, that the defendant might not be found guilty of the crime charged in that count upon the uncorroborated testimony of "Susan Ippolito" (the allegedly aborted woman); and it instructed that the necessary corroboration might be supplied by the testimony of "Francis B. Hart." The

same instruction was repeated as to Count Three with respect to the testimony of "Luella Mae Coon" (the allegedly aborted woman), and the corroboration which might be found in the testimony of "Beulah Black." In the face of such instructions the jury could not reasonably have rejected the testimony of the aborted women and convicted solely upon the testimony of the alleged accomplices.

The judgment and the order denying the motion for a new trial are affirmed.

SPENCE, *J.*

We Concur:

GIBSON, *C. J.*
SHENK, *J*
CARTER, *J.*
TRAYNOR, *J.*
SCHAUER, *J.*

People v. Davis. Crim. 5618.

CONCURRING OPINION OF EDMONDS, J.

to

OPINION BY SPENCE, J.

In my opinion, the circumstances relied upon by Davis as establishing an abuse of discretion in the denial of his motion for continuance are not so compelling as those shown in People v. Dorman, 28 Cal. 2d 846. I, therefore, concur in the judgment.

EDMONDS, J.

APPENDIX C.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Present: Hon. Mildred L. Lillie, Judge, No. 156453.

The People of the State of California, vs. George R. Davis.

JUDGMENT

Whereas the said defendant, having been duly found guilty in this Court of the crime of Abortion (Vio. Sec. 274, PC) a felony, as charged in Counts 2 and 3 of the Information.

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law on each Count.

Counts 2 and 3 of the Information are ordered to run Concurrently with each other.

It is further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

Done in open Court this 19th day of August, 1953.

State of California, County of Los Angeles—ss.

I do hereby certify the foregoing to be a true and correct copy of the judgment duly made and entered on the Minutes of the Superior Court in the above entitled action.

Attest my hand and the seal of the said Superior Court this 19th day of August, 1953.

HAROLD J. OSTLY,
County Clerk,

By E. WHENHAM,
Deputy.

MILDRED L. LILLIE,
Judge of the Superior Court.

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

Attest Feb. 16, 1955.

(Seal) HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By ROSE CHAVEZ,
Deputy.